

ULF T. TEIGEN, MONA A. TEIGEN
(ON RECONSIDERATION)

IBLA 98-235R

Decided May 27, 2003

Petition for reconsideration of Board's decision in Ulf T. Teigen, 153 IBLA 273 (2000), vacating the decision of the California State Office, Bureau of Land Management, wherein mineral patent application CACA-28542 was rejected and the First Half Final Certificate was canceled, and remanding the matter to BLM pending lifting of the statutory moratorium for processing mineral patent applications.

Reconsideration granted; decision in Ulf T. Teigen, 153 IBLA 273 (2000), vacated; and decision appealed from affirmed.

1. Administrative Procedure: Generally--Rules of Practice: Appeals: Reconsideration

While the Board is reluctant to grant a petition for reconsideration on the basis of new information submitted with the petition and unaccompanied by an explanation as to why it was not provided prior to the decision which the party seeks to have reconsidered, extraordinary circumstances arise where error exists in the premise upon which the decision to be reconsidered was grounded and, in the absence of reconsideration, the result would ignore a decision by the Secretary.

2. Administrative Authority: Generally--Rules of Practice: Appeals: Supervisory Authority of the Secretary--Secretary of the Interior

As the Board has no jurisdictional authority concerning matters covered by an action or decision of the Secretary except in the limited circumstance of determining whether the Secretary's determination was properly applied and implemented, we must uphold the processing by BLM of a mineral patent application deemed "grandfathered" by Secretarial finding from a statutory moratorium otherwise barring such processing.

3. Mill Sites: Dependent--Mill Sites: Patents--Mining Claims:
Mill Sites

A mineral patent application for a dependent mill site claim will be rejected if it is not associated with a lode claim which has already been patented or will be patented simultaneously with the mill site claim.

APPEARANCES: Karen Hawbecker, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management; Jean S. Klotz, Esq., Placerville, California, for Appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Counsel for the Bureau of Land Management (BLM) has filed a petition for reconsideration of the Board's decision in Ulf T. Teigen, 153 IBLA 273 (2000), vacating the decision of the California State Office, BLM, which had rejected mineral patent application CACA-28542, for the Pine View No. 1 Quartz Lode Mill Site Claim (CAMC-242999) and canceled the First Half Mineral Entry Final Certificate. Our decision also remanded the matter to BLM pending lifting of the moratorium enacted by Congress in section 314(a) of the Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1591 (1997), which precluded BLM from processing patent applications for any mill site claim during the 1998 fiscal year when BLM issued its decision.^{1/}

^{1/} The moratorium

"was first enacted by Congress with passage, on September 30, 1994, of section 112 of the Department of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2519 (1994), which precluded the expenditure of funds to accept or process applications for patent for mining or mill site claims. It was in effect for the 1995 fiscal year, from October 1, 1994, to September 30, 1995. Subsequent legislation has extended the moratorium through every succeeding fiscal year, including fiscal 1998, in which the BLM decision issued, and subsequent fiscal years. See [Pub. L. No. 104-134, § 322, 110 Stat. 1321-203 (fiscal 1996); Pub. L. No. 104-208, § 314, 110 Stat. 3009-221 (fiscal 1997);] Pub. L. No. 105-83, § 314, 111 Stat. 1591 (fiscal 1998); Pub. L. No. 105-277, § 312, 112 Stat. 2681-287 (fiscal 1999); Pub. L. No. 106-113, § 312, 113 Stat. 1501A-191 (fiscal 2000)."

Ulf T. Teigen 153 IBLA at 275. The moratorium has been continued and is still in effect. See Pub. L. No. 106-291, § 311, 114 Stat. 988 (fiscal 2001); Pub. L. No. 107-63, § 312, 115 Stat. 414 (fiscal 2002); Pub. L. No. 107-229, §§ 101, 104, 116 Stat. 1465 (continuing resolution).

[1] A petition for reconsideration may be granted only in extraordinary circumstances where in the judgment of the Board good reason is shown therefor. 43 CFR 4.21(c); 43 CFR 4.403; see, e.g., Gary L. Carter (On Reconsideration), 132 IBLA 46, 48 (1995). In the instant situation, BLM now appears before the Board to argue that the Board erred in its application of the statutory moratorium by concluding that the subject application was not “grandfathered.” In support thereof, BLM provides a copy of the “Five Year Plan for Making Final Determination on Ninety Percent of Grandfathered Mineral Patent Applications, Initial Report and Action Plan” (Report), a report sent by the Secretary to Congress on July 26, 1996. Therein at Appendix 3, the subject patent application (CA-028542) is listed as one “grandfathered” from the application processing moratorium. However, that fact was not readily ascertainable from the case file previously before the Board. The only reference to grandfathering this application appears in a May 16, 1996, letter to the Teigens announcing that the Department had been directed to process all grandfathered applications. There was no rationale provided as to how this application was deemed grandfathered, other than to state that those applications for which first half final certificates (FHFC’s) had been issued or were under review by the Office of the Solicitor or elsewhere in the Department in Washington, D.C., were to be considered exempt from the moratorium. It appears that BLM neither appeared before the Board to argue this aspect of the matter nor offered a copy of the Report in the initial briefing of this appeal. The applicability of this report to the subject mill site claim was not a factor considered by the Board in rendering our determination. Rather, our decision was reached on the ground that the case file did not disclose that all the requirements of 30 U.S.C. § 42 (2000) had been satisfied for this application, a key criterion set forth in the statutory language establishing the moratorium, and therefore the grandfather provision was not applicable.

Generally, the Board is reluctant to grant a petition for reconsideration on the basis of new information submitted with the petition and unaccompanied by an explanation as to why it was not provided prior to the decision which the party seeks to have reconsidered. See Dugan Production Corp. (On Reconsideration), 117 IBLA 153, 158 (1990) (dissenting opinion discussing the preamble language relating to promulgation of the current version of 43 CFR 4.403). In this case, however, an extraordinary circumstance obtains because of error in the premise upon which our decision was issued. See, e.g., Joan Chorney (On Reconsideration), 109 IBLA 96, 97 (1989) (error in fundamental premise); Scott Burnham (On Reconsideration), 103 IBLA 363, 364 (1988) (error).

In the decision being reconsidered, we vacated BLM’s action as the record did not contain information indicating that the claim had been found by the Secretary to be grandfathered. The BLM failure to provide this information in the case file does not, however, authorize the Board to ignore the Secretary’s action in finding that the subject mill site claim was grandfathered. We find that sufficient reason to examine

the impact of this information on the conclusions reached in our prior decision has been shown and, accordingly, the petition for reconsideration is granted.

A review of this matter starts with the patent application filed by the Teigens on July 31, 1991, for the Pine View No. 1 Quartz Lode Mill Site claim, seeking 5 acres of non-mineral public land. The patenting of non-mineral lands for a dependent lode mill site, i.e., a mill site used or occupied for mining or milling purposes in connection with a specific lode mining claim with which the mill site claim is associated, is authorized by 30 U.S.C. § 42(a) (2000). The Department has established that the plain language of the statute requires that a dependent mill site claim, such as the one at issue here, may be patented only if the mining claim to which it is appurtenant is either already patented or a patent is granted simultaneously with the mill site claim. See Union Phosphate Co., 43 L.D. 548, 550-51 (1915); Eclipse Mill Site, 22 L.D. 496, 499 (1896). While it appears that appellants hold several mining claims in the immediate vicinity which would be served by the subject mill site claim, the record indicates that the mill site claim is specifically associated with the Columbus Extension lode mining claim, CAMC 37465. A patent application for this mining claim was apparently submitted to BLM on October 3, 1994, but was not accepted for filing due to the “1-year” moratorium on processing mineral patents. Thus, as appellants have acknowledged, under the moratorium BLM was not authorized to accept, even for filing purposes, their patent application for the Columbus Extension lode mining claim. 153 IBLA at 275-76, citing Statement of Reasons (SOR) at 6. Therefore, maintaining that the Congressional moratorium precluded both BLM adjudication of the mill site patent application and the filing of the patent application of the associated lode mining claim, appellants sought to have their mill site patent application remanded to BLM to be held pending a lifting of the moratorium and the refiling of the patent application for the associated mining claim.

Upon our prior review of this case, we reasoned in Teigen, 153 IBLA at 276, that BLM, by virtue of the moratorium, was precluded from adjudicating mill site patent applications and therefore vacated its adjudication in this matter. We did note, 153 IBLA at 276 n.1, that there existed an exception for those applications filed on or before September 30, 1994, where the Secretary had determined that “all requirements” of 30 U.S.C. § 42 (2000) were fully satisfied by that date. See 111 Stat. 1591 (1997); 108 Stat. 2519 (1994). We concluded, however, that the subject application did not fall within that exception since BLM had determined that the requirement that a dependent mill site claim be patented with an associated lode mining claim had not been satisfied. 153 IBLA at 276 n.1.

In its petition, BLM argues that the Board erred in regarding patent entitlement as the standard in this case for determining whether the patent application was grandfathered from the moratorium. (Petition at 3.) Thus, BLM explains that after enactment of the moratorium, the Department had to determine

which of the pending patent applications was grandfathered before expending funds to adjudicate them.^{2/} This process, as BLM states, involved identifying those applications where an application for a FHFC had either been signed or was pending with an office of the Department in Washington, D.C., as of September 30, 1994. Further, as BLM relates, the Department was required by Congress to detail a plan how it would process those applications which were considered grandfathered. Although the FHFC for the subject application was issued after September 30, 1994, the application had been pending before the Department in Washington, D.C., and was listed in its report to Congress. Hence, BLM argues that the Board is bound by and cannot ignore the Secretary's finding which deemed the instant application to be grandfathered.

In response, appellants contend that, in consideration of the amount of time, effort, and money expended on their mill site patent application, it should be held in a pending status until the moratorium is lifted and they have the opportunity to submit related lode claim patent applications. They suggest that it would be unfair to allow BLM to reject the instant application when, due to the moratorium, BLM refuses to accept their patent applications for associated lode claims.

[2] It is well established that this Board must defer to such Secretarial determinations governing matters under review. 43 CFR 4.410; see Bill Smith Coal Co. v. OSM, 101 IBLA 224, 228 (1988); A.C.O.T.S., 60 IBLA 1, 2 (1981). We have no jurisdictional authority concerning matters covered by the Secretary's decisions except in the limited circumstance where the appellant's object clearly is to show BLM's noncompliance therewith. Id. Accordingly, where a Secretarial decision is the basis for action by an agency of this Department, the Board will only review the case for the purpose of deciding whether the Secretary's determination was properly applied and implemented. Dolores M. Lisman, 67 IBLA 72, 74 (1982); Susan Delles, 66 IBLA 407, 409 (1982).

The effect of the information submitted on reconsideration is to establish that the Teigens have appealed a decision resulting from BLM's compliance with a Secretarial determination. As noted, Congress imposed a moratorium enjoining the Secretary from expending funds to accept new patent applications and to process patent applications pending in the Department, subject to certain exceptions. See n. 1, infra. Congress allowed the Department to continue processing any patent application for which

the Secretary of the Interior determines that, for the claim concerned:
(1) a patent application was filed with the Secretary on or before the

^{2/} On reconsideration, BLM notes that it was barred by the Appropriations Acts from expending funds to process or adjudicate any claims which were not grandfathered.

date of enactment of this Act, and (2) all requirements established [by statute for patenting] were fully complied with by the applicant by that date.

108 Stat. 2499, 2519. Guidance in determining which pending applications should be considered to be grandfathered and, hence, should be adjudicated to determine whether all requirements had been satisfied was a focus of the Conference Report:

The managers agree that those applications having received first-half-final certificates on or before the date of enactment of this Act are not subject to the prohibition in Section 112. In addition, the managers agree that those applications for first-half-final certificates currently pending in the Office of the Solicitor in Washington, D.C. or elsewhere in the Department of the Interior in Washington, D.C. will not be subject to the moratorium in Section 112.

H.R. Rep. No. 103-740, 103d Cong., 2d Sess., at 37 (1994). Following this guidance, BLM issued Instruction Memorandum No. 95-01, dated October 4, 1994, concluding that “[o]nly the following applications may be processed: (1) Those for which a FHFC was signed before October 1, 1994, and; (2) those for which a FHFC was pending in Washington, D.C., as of September 30, 1994.” On September 30, 1994, the subject application did not have a FHFC. The record shows that the Secretary signed the FHFC on January 5, 1995--the first confirmation that the Secretary had determined that this application had been grandfathered from the moratorium.

In addition, Congress enacted the Interior and Related Agencies Appropriations Act for Fiscal Year 1996, which required the Secretary to file within 3 months a plan detailing how the Department would make a final determination on at least 90 percent of the grandfathered applications within the following 5-year period. 110 Stat. 1321-203; see also 110 Stat. 3009-221 (1997 Appropriations Act). On June 26, 1996, the Secretary sent the plan to Congress, wherein he listed those applications which he had determined to be grandfathered from the moratorium. Of 626 patent applications pending with the Department on September 30, 1994, the Secretary regarded 386 applications as grandfathered. See Report at 16. The subject patent application was one. See Report, Appendix 3 at 5.^{3/}

Thus, we find that our holding in Teigen is indeed at odds with the Secretary’s actions and underlying determinations, undertaken in the Department’s endeavor to comply with Congressional requirements. As the Secretary clearly found that the

^{3/} In light of the BLM decision appealed here, a subsequent report to Congress on the progress of the plan characterizes this application as one for which a final determination had been made. See 1999 Report, Appendix 3 at 2.

patent application under review was grandfathered, we must defer to that decision. Accordingly, we must vacate our conclusion in Teigen that the patent application was not excepted from the moratorium. In doing so, we now must review BLM's determination to reject the application.

[3] The appealed decision was based on a finding that the Teigens had not complied with the general rule that a dependent mill site claim may only be patented if the mining claim to which it is appurtenant is either already patented or a patent is granted simultaneously with the mill site patent. In Teigen, 153 IBLA at 274-75, we referenced the several Departmental authorities establishing this rule, e.g., Union Phosphate Co., *supra*; Eclipse Mill Site, *supra*. See also Pine Valley Builders, Inc., 103 IBLA 384, 387-89 (1988) (an appurtenant mill site shall be patented, if at all, only simultaneously with the lode claim or claims to which it is appurtenant unless the lode claim should have been previously patented). We further recognized the unusual circumstances regarding the associated claim in this case:

[A]ppellants concede that patent has not issued for the associated mining claim because of the moratorium. While the lack of patent for the mining claim would ordinarily justify BLM rejection of the mill site patent application as noted above, this case involving the moratorium raises a unique situation.

Appellants have provided evidence that they had sought to obtain a patent for the Columbus Extension lode mining claim in conjunction with their mill site claim. We note that BLM does not dispute their assertion that they prepared a 1993 mineral survey (No. 7002, which was accepted by BLM on June 23, 1994) and a certificate of title, dated September 20, 1994, for the claim, and that appellants later submitted a mineral patent application for the claim to the BLM State Office on October 3, 1994. (SOR at 5.) Nor does BLM challenge appellants' further assertion that the application was "not accepted [for filing] due to the [1-year] moratorium on processing mineral patent applications effective October 1, 1994," or that, "[b]ecause the moratorium was to end on September 30, 1995, appellants attempted to re-file their application[] on November 14, 1995," but were precluded from doing so because the moratorium had been continued. *Id.*

153 IBLA at 275. Appellants assert that, but for the moratorium, it is "highly likely" that the patents for the lode mining claims would have already been issued by the time BLM adjudicated their mill site patent application in its March 1998 decision. (SOR at 5.) Since the filing of the mining claim patent applications had been precluded by the moratorium, appellants assert that, rather than rejecting the mill

site patent application in March 1998, BLM should have delayed processing it "until such time as it can be processed simultaneously with the [mining claim] patent applications." Id. at 6.

We find that appellants' statements in this matter sustain, rather than refute, BLM's decision to reject the subject application. Mineral Patent Application CACA-28542 was filed with BLM on July 31, 1991. When the moratorium was effectuated on September 30, 1994, there was no pending mineral patent application for an associated mining claim. Appellants admit that fact, although it is apparent that they intended to file such an application. Under the pertinent rule, since the mill site was not associated with an existing patented mining claim, a patent for this mill site claim could only be granted simultaneously with a lode claim patent. As the moratorium prevented the filing of a mineral patent application for a mining claim to be associated with this mill site claim, as appellants concede, that could not happen. Because the Secretary has found this mill site application to be grandfathered, BLM could not postpone a decision in the matter. Accordingly, it was BLM's obligation to proceed with a determination rather than suspend consideration. We find that BLM properly rejected the subject mineral patent application.^{4/}

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, reconsideration of our decision in Ulf T. Teigen, 153 IBLA 273 (2000), is granted, our decision therein is vacated, and the BLM decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

^{4/} Appellants state that they intend to resubmit their mining claim patent applications "as soon as possible" after the moratorium is lifted. (SOR at 5-6.) Rejection of their mill site patent application here will not preclude appellants from refiling in association with a mining claim patent application when the moratorium is lifted, as BLM expressly recognizes. (Petition at 7.)